

Rena Selden
Attorney at Law
2910 North 7th Avenue
Phoenix, AZ 85013

Phone: 602-241-1000

Fax: 602-241-1001

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The Honorable Bruce R. Cohen
Chairman, Arizona Child Support Guidelines Committee
Maricopa County Superior Court
Southeast Judicial Center
Mesa, Arizona

Re: Guidelines in process

Dear Judge Cohen:

In light of the meeting scheduled for 6/4/10, I would like to share a few thoughts on the Guidelines in process at this time. I'm sorry that my schedule did not permit providing this earlier. I just learned of this meeting about 2 weeks ago, and have been heavily scheduled since. I will bring printed copies with me tomorrow. Copies of this email are being sent to Ms. Sekardi and Mr. Vert, just in case they are able to forward this to anyone who will not be present on Friday.

The Committee has done an admirable job of reviewing economic data. As I have no special expertise in that area, my comments do not directly address the numbers. Rather, as an attorney who has practiced family law for 20 years, the following comments are submitted in the hope that they may assist the Court and litigants, through clear communications of expectations. In certain instances, there are proposals to actually change certain provisions, which seem somewhat harsh, to at least allow the exercise of discretion by the judicial officers. Some of the information available online today, shows that some concerns similar to mine have been raised. I will try to state my concerns succinctly.

Some concerns were previously stated at the meeting on March 25, 2010. If I am not aware of any changes based on those comments, they may be mentioned again.

I would appreciate notice, as to the next steps after this meeting. Will the Committee present amended proposed guidelines to the Arizona Judicial Council at its next meeting, this month, or wait until the meeting in the fall?

ISSUE – EFFECTIVE DATE

It seems appropriate to clarify when the new guidelines will apply....For actions filed after 1/1/2011? For actions served after 1/1/2011? For actions heard after 1/1/2011?

ISSUE – DISCLOSURE REQUIREMENTS

The proposed guidelines continue the mandate of disclosure every 2 years, as to finances. I submit that this is not sufficient. Each parent should be required to disclose contemporaneously – say within 30 days – any change of employer and/or position -- with name and address AND phone number of the employer.

The section on disclosure should include a reference to the statute allowing inquiry to the employer of basic income information. And that section should be reviewed to see if recommendations are warranted, to enhance the scope of the employer's duty of disclosure.

As many people do not know about pre-tax benefit programs and/or employer matching of pension or savings contributions and/or stock options, the disclosure provision should be far more comprehensive.

As to any change of personal address and phone number, this should be required in advance if possible and if not in advance, immediately upon implementation, and in no event, less than 7 days later.

It seems reasonable to require parents to disclose to one another, the regular and backup paid caregivers for the children, so that the other parent knows where the child is likely to be during work times.

Any change or loss of health insurance coverage should be disclosed promptly upon knowledge of the situation. And if the parties reach an agreement for the other parent or step-parent to provide coverage at least on an interim basis, or for COBRA or other alternative coverage to be purchased, any change implicated in the child support amount should be allowed, provided an application for modification is filed to affirm or address the issue, within 30 days of the loss of coverage. The Court should have the authority to allocate medical expenses incurred out of pocket due to a timely failure of disclosure.

Health insurance disclosure should be better defined – to include the name, address and phone number of the company and its benefits office, an identification card, a benefits booklet, a provider listing if applicable.

Page 20 of the proposed guidelines contains only a general provision about parents using their best efforts to obtain services that are covered by the applicable insurance. However, there is no sanction for willful or reckless refusal to do so. The Court should have the authority to allocate medical expenses incurred out of pocket due to such willful or reckless actions.

ISSUE – OVER 12 ADJUSTMENT

Page 57 of the March 25th report references elimination of the over 12 adjustment. I do not understand why, and would appreciate clarification.

ISSUE – BENEFITS PAID TO A CHILD

Page 61 of the March 25th report references that monies paid as benefits or income of a child shall not be counted in apparently any way. Examples and rationales would be appreciated. While this is not new, this information would be helpful to attorneys and the public.

ISSUE – SELF-EMPLOYED PERSONS

Page 63 of the report is somewhat vague as to use of the Simplified Procedure by self-employed parties. It seems that they can try it, but if the other party objects, hearing will be held – which is how it works now for all cases. Should there be expanded instructions on the Simplified Procedure forms, to clarify whether and/or how it can or cannot be used?

Page 5 of the proposed guidelines refers to the Court not including income greater than what would be earned from full-time employment. Often self-employed persons work 60 or more hours per week. Should the Court have discretion to adjust the attribution of income to self-employed persons, in the same manner as for employed persons?

ISSUE – TERMINOLOGY

Page 3 of the draft guidelines refers to “Noncustodial Parent” and seems to define it based on parenting time. Perhaps this should be changed to “Non-primary parent”. Or maybe new terminology is needed, rather than primary and implied secondary parents. Perhaps only references to Mother and Father would work, with references to Obligor and Obligee...Mother/Obligee or Mother/Obligor, for example.

ISSUE – EQUAL MONTHLY PAYMENTS VERSUS OPTION FOR DIFFERENT PAYEE/PAYOR RELATIONSHIPS FOR SUMMER AND SCHOOL YEAR

Allowing child support to change in the summer when the non-primary parent is more likely to have the child almost full time creates many complications. However, I am wondering if there has been any consideration of such a process, at least by agreement of the parties. Does any other state allow for a payment schedule other than 12 equal monthly payments?

ISSUE – IMPLICATIONS OF PRE-TAX DOLLARS BEING USED TO PAY MEDICAL PREMIUMS AND/OR EXPENSES AND ALSO CHILD CARE.

The proposed guidelines do not appear to have given any thought to the implications of payment of such expenses with pre-tax dollars. Should, for example, the pre-tax dollars – at least to the extent used – or usable? – for these purposes - be counted as gross income? Is a pre-tax dollar of equal value to an after tax dollar? Employers do seem to be cutting back on such programs, but they are still out there. Some thought and some mention seems appropriate.

ISSUE – SPOUSAL MAINTENANCE IMPLICATIONS

There is some discussion in these guidelines, of the fact that the child support may in part subsidize the cost of living of the payee. There may be cases where spousal maintenance is not ordered, at the time of the establishment of the child support order, because the substantial child support appears to make it unnecessary. (I am aware that the Court is supposed to establish the need for spousal maintenance first, and then child support, however the process appears to be inter-dependent.) It appears foreseeable that upon emancipation of one or all of the children, the payee spouse, who did not previously need spousal maintenance, might need it, especially in a long term marriage. However, to the best of my knowledge, if maintenance is not ordered at the time of dissolution, it cannot be ordered later. Has anyone done a case analysis with cases involving spousal maintenance? Has anyone considered the implications to the payee parent, after raising the children has been completed?

ISSUE – TRAVEL EXPENSES

The 100 mile requirement in the guidelines, before allocation of expenses, seems unjust, in light of the high cost of travel. If a parent is required to travel 200 miles round trip, that, by federal mileage standards, could have a true cost of about \$100. The guidelines should provide for discretion to award travel expenses with a lower distance.

ISSUE – PHASE IN OF REVISED SUPPORT AMOUNTS

The draft guidelines – at page 30 - provide for a maximum phase-in period of 18 months, for new guideline amounts. I submit that this should be a matter of discretion for the Court, and not a mandate. In some cases, even 18 months might not be enough time for someone to reduce housing expenses or other contractual obligations in this economy.

Also, it appears that the phase-in language pertains only to increases in child support. I believe Dr. Ellman indicated that some changes might be a reduction in support. The payee may also need time to adjust expenses, in the case of a reduction. This language may need modification to reflect this.

Finally, only a resulting percentage of 150% or greater allows for phase-in. I submit that changes of less than 150% could be an extreme burden on either party. Perhaps this could be stated as a presumptive figure to allow phase-in, but not an exclusionary type of rule.

Also, the language refers to a change from what the amount would be under the old guidelines versus what it would be under the new guidelines. Why is there no reference to the amount it actually has been, versus what it would be under the new guidelines?

ISSUE – NEW STATUTE ON SHARED PARENTING

I have seen little or no discussion of the implications of the new statute as to both parents sharing in parenting decisions, and the potential nightmare of litigation this may cause, implicating child support modifications. What if the parent now sharing in decisions disagrees with the primary parent's choice of child care provider, if a less costly alternative, private or public, is available? Will such shared decision-making occur only in new cases, or will there be some sort of automatic sharing in cases where previously, one parent had sole legal custody?

ISSUE – CONSTITUTIONAL ISSUE AS TO LEGISLATIVE DELEGATION TO SUPREME COURT TO DEVELOP STATUTORY CHILD SUPPORT GUIDELINES

Mr. Hamu raises this constitutional issue, only with reference to COBS. If it is an issue, it seems that it would apply to any adoption of child support guidelines by the Judiciary. I am not a constitutional scholar and offer no opinion on the issue. However, as stated in my comments to the Arizona Judicial Council, I do believe that the Judicial Council, if acting in a quasi-legislative capacity, has a duty to act in a manner consistent with laws applicable to the legislature. Hopefully, someone has examined this.

While the meeting on 6/4 has an agenda period for public comment, and this was the subject of a press release from the Supreme Court, I am not aware that the lay public knows anything about the meeting. However, perhaps it is not the fault of the Supreme Court, if reporters fail to do their job in reporting on the press release topic.

ISSUE – FAIR ALLOCATION OF CHILD CARE AND MEDICAL INSURANCE COSTS BETWEEN PARENTS

You have raised the issue of the correct gross income to be applied, to determination of the parents' respective shares of these costs. Professor Ellman has proposed language, which would clarify that these proportions shall be determined after the preliminary support amounts are determined. While his suggested language addresses

that substantive point, it is somewhat formal. I would like to suggest the following language, if that is the position the Committee elects to take:

"Certain expenses for children are not part of the preliminary support computation, as they vary widely between families. As a general rule, they are shared by the parents, in relation to each parent's share of the combined incomes considered in the preliminary computation. For example, if one parent earns one-third of the combined incomes, he or she pays one-third of these expenses, in addition to the preliminary support computation."

I would also like to suggest an additional step. Once each parent's share of these expenses has been computed, this should be considered an "adjusted preliminary support computation". The new figures assigned to each parent, should then be assessed in relation to the same criteria considered in the first step – i.e. where do these additional obligations place the obligor in relation to the poverty level? Once that step has been completed, the Court's discretionary authority to allocate such expenses in an alternative just manner should be stated.

On page 46 of the March 25th report, average medical premiums are estimated at \$132 and average child care costs at \$412. These figures are from 2007 and seem pretty obsolete (low). Nevertheless, if these are allocated proportionate to incomes, the changes should be fairly allocated.

ISSUE – SPECIAL NEEDS CHILDREN

Special needs children seem to tend to get short shrift. Has anyone examined the true needs, and the third party benefits available? I have, sadly, seen a primary custodial parent experience extreme hardship, with the other parent taking little responsibility.

ISSUE – MENTION OF VARIOUS "PRINCIPLES" IN REFERENCE TO COBS

Page 50 of the March 25th report mentions the "Child's Well-Being Principle", the "Dual Obligation Principle", the "Earner's Priority Principle", and the "Disparity of Income Principle". Are these addressed anywhere?

ISSUE – CHILDREN OF OTHER RELATIONSHIPS

The proposed guidelines – at page 7 - continue the determination that the need to support children of other relationships should be used only to adjust the gross income of the party. This seems unfair. Has anyone examined how – at any step of the computation procedure – other states have addressed the need to support other natural or adopted children?

ISSUE – DUPLICATE COSTS

Page 9 of the proposed guidelines assumes that a father who has the child 15% of the parenting time will not incur any “duplicatable costs.” Fifteen percent of a year can be about 50 days. This may be an accurate assumption – if the mother – in this example – is sending the child with appropriate clothing, school supplies, and recreational media – and the father is returning them with the child. Perhaps the example could limit arguments by encouraging cooperation in this manner. It should be self-evident, but that’s not necessarily so.

ISSUE – PARENTING TIME COMPUTATION

Page 10 of the proposed guidelines discusses the calculation of parenting time. In the description, it seems that the “non-custodial” – there’s that word again! – gets credit for school time during his or her parenting time, but the “custodial” parent does not. I have seen arguments about whether the “primary” parent should get credit for school time and/or day care time. Perhaps it could be clarified that the “custodial” parent’s time includes “all time from beginning to end of each block of parenting time” as well.

ISSUE – UNREIMBURSED MEDICAL EXPENSES

Page 19 of the guidelines addresses the timing of requests for reimbursement of uninsured medical, dental and/or vision costs. I’m not sure if these times were addressed in current guidelines. If not, some clarification that expenses incurred prior to the effective date of these guidelines – whatever that may precisely be – shall be presented on or before six months after the effective date.

ISSUE – INCOME ATTRIBUTION IN CASES OF UNEMPLOYMENT OR WORKING BELOW FULL EARNING CAPACITY

The current wording of the guidelines provides seemingly adequate discretion to the Judges, with one possible exception. The following sentence contains mandatory language, which perhaps should be precatory.

“If there is no available income information, the court shall presume that each parent is capable of earning at least the applicable minimum wage and attribute that amount to the parent.”

My concerns with that language are three-fold.

“[N]o available income information” is somewhat vague. Does it mean the responding party failed to respond? Does it mean that they had never worked? Does it mean they are still in high school and can’t work full time? Does it mean that they failed to respond to requests for information?

Secondly, the sentence says "shall presume". If it said "may presume", it would grant more discretion to the Court.

Thirdly, attribution of minimum wage may be patently unfair. A person may be clearly paying his or her bills at a level clearly higher than a minimum wage income might provide. In such cases, no actual "income information" might be available. The Court should further have discretion to attribute an income higher than minimum wage, with a requirement of specific findings and conclusions.

As to the memo submitted by Professor Ellman, it has many helpful suggestions, which largely address my concerns. There is typo in paragraph 5 b ("earnings" instead of "earning". It seems that his paragraph 5 c is intended to reduce imputed income by child support costs to be imputed, while not making the payor pay more support because of such imputed child support costs – apparently in consideration of the Engel case. I'm just not sure the Judges should be reducing attributed income by fictional child care costs, however Professor Ellman's language does give discretion. Another comment as to Professor Ellman's language – I could not find reference to the incarceration exception, which should be added back in.

ISSUE – RETROACTIVE CHILD SUPPORT MODIFICATION

Professor Ellman's memorandum provides some interesting history and a valuable suggestion. I would agree that any child support order should include clear language letting people know (1) that child support is modifiable or terminable based on substantial and continuing changes of circumstances, and (2) giving fair warning of procedures required to modify or terminate a child support order and the separate wage assignment. Perhaps a recitation of potential substantial and continuing changes might be helpful – as long as it states clearly that this is not an exclusive listing. Such changes might include job loss, income reduction, graduation of a child from high school after age 18, a child attaining the age of 18 after graduation, a child attaining the age of 19, after-born children requiring support, elimination or reduction of child care costs...

Page 27 of the proposed guidelines – at paragraph B – addresses the need to make a request or petition to submit an agreement in writing to recalculate support. This should be expanded to clarify precise terms regarding the filing date, the service of process date, and the effective date – with the possibility of a delay in hearing which may result in a cumulative over-payment or under-payment at the time of hearing.

Perhaps it should also be clarified that one may wish to apply for the modification a few months in advance of the expected change, with the understanding that a hearing might not occur for a while, and/or that the change would take place only if and when it actually happened.

ISSUE – SIMPLIFIED PROCEDURE

Pages 27 – 28 of the proposed guidelines address the Simplified Procedure and clarify documentation which must be submitted with it. No mention is made of redaction by the Clerk of confidential information. In light of the significant threat of identify theft, this should be mentioned. Consideration might also be made of not requiring filing of the items but requiring disclosure and service to the other person, with only the filing of a list of the items disclosed and served.

ISSUE – ALLOCATION OF THE DEPENDENCY EXEMPTION

It would certainly be possible to grant the Court discretion to credit the value of the dependency exemption to the payor. However, this would be patently unjust. The payor would fail to pay and then suffer no consequence. If the payee gets some sort of windfall, it would justly help to defray the hardship incurred due to the payor's lack of payment.

If the payor's failure to pay were due to job loss, possibly too late in the year to finalize a child support modification, that might be a reasonable justification for an exercise of discretion by the Court. However, any such discretion should be limited to extraordinary circumstances.

And of course, whenever discretion is broadened, litigation is encouraged.

A selection of 75% compliance as justification to still be able to claim the dependency exemption seems unjust to the payee, for whom a 25% reduction in child support revenues could work extreme hardship.

While the proposed guideline states that the Court shall order that the payee provide the paper work to the payor, to enable claiming the dependency exemption, there is no stated sanction for failure or refusal to do so, despite the serious financial implications to the parties. There should be a mandatory sanction for failure to do so in a timely manner, or for falsely claiming a child as a dependent when the other parent was entitled to do so.

ISSUE – CONTRIBUTIONS BY NEW SPOUSE OR SHARED HOUSING PARTNER

It seems that current language gives the Court adequate discretion without inviting substantial numbers of litigants.

To the best of my recollection, in over 20 years, I have never seen a Judge reduce or increase child support in light of any other actual net living expense. Some people drive expensive cars, some drive clunkers. Some move into a less desirable neighborhood, some construct dream homes. Some eat out a lot, some cook a lot of Ramen noodles.

In fact, the only purpose the detailed expense inventory seems to serve, is to reconstruct true income, when income is being misrepresented.

Also, shared housing partners are inherently unstable, which could easily cause more litigation.

I submit that attributing full time income to a person whose spouse provides some support, enabling part-time employment or no employment, is a substantially different matter than going into one's expenses and contributions to them.

ISSUE – DEFINITION OF A DEVIATION FROM THE GUIDELINES

The joint Ellman submission provides some suggested qualitative language and a proposed chart of ranges of incomes. It is not clear, how that chart was derived. Some explanation would be of interest. The introductory language might clarify that similar qualitative considerations might apply in cases with different incomes, but that the 25% non-deviation deviation only applies as to the stated income ranges, to avoid misunderstandings.

The qualitative language in the memo is of interest, and suggests further consideration of implications, which might take a little time.

ISSUE – DISCUSSION OF GUERRA V. BEJARANO

The kernel which this case suggests, is that perhaps the guidelines should be revised to state that when there has been willful and deliberate fraud or concealment of information as to a child's school, marital, residential, or other status related to emancipation, by the payee of child support, the Court may equitably consider a just and proper effective date as to a request for modification. Or if this would be a violation of the federal law, then language providing for discretionary financial sanctions on the perpetrator of the fraud or concealment should be added.

I am surely not the only attorney who has had client, who have been the victim of an out-of-state parent failing to disclose marriage or other emancipating factors. And the children do have an incentive to participate in the deception, if the payee shares the ill-gotten support monies.

CONCLUSION

I suppose there will always be people who will not thoroughly read the guidelines, no matter how well they are written. It is my hope that by enhancing clarity and communication in the guidelines, at least some misunderstandings and litigation may be avoided. I hope this is helpful, as that is my intent. Thank you very much for your consideration.

Very sincerely,

A handwritten signature in black ink, appearing to read 'R. Selden', written over a horizontal line.

Rena Selden
Attorney at Law

Copy: Kathy Sekardi
Donald Vert